(3)

No. 06-1287

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

STATE BOARD OF EQUALIZATION of the State of Georgia; Bart L. Graham, as Commissioner of Revenue of the State of Georgia; Russell W. Hinton, as State Auditor of the State of Georgia; and Gena L. Abraham, as Director of the Georgia State Properties Commission,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

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RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition is current.

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REPLY BRIEF

The Eleventh Circuit stated succinctly why certiorari should be granted in this case: "This appeal presents a question about state taxation of railroad properties that was expressly left open by the Supreme Court of the United States, has since divided the federal appellate courts, and involves the traditional balance of federal and state power." Pet. App. 1a. Respondents' attempts to contradict the impartial views of the Eleventh Circuit regarding the circuit conflict are unavailing.

Not only is there a clear circuit conflict in need of resolution by this Court, but this is a case of high importance. The 4-R Act, passed against a long history of state discrimination in the taxation of interstate railroads, is an essential safeguard of the financial health of the rail industry. The rule adopted below forces a federal district court charged with determining the "true market value" of railroad property to accept "all nonfactual determinations . . . [by the State's appraiser] in constructing a valuation process, regardless of how broad or narrow they may be." Pet. App. 17a. That rule ignores the clear language of the statute, frustrates the statute's fundamental purpose of preventing discriminatory taxation, and opens a gaping loophole through which States can extract a disproportionate share of tax revenue from interstate railroads without fear of federal remedy. Indeed, Georgia's valuation of the taxable railroad property of CSXT has more than doubled since 2001 (from $378 million to $762 million), and from 2005 to 2006 alone railroad property valuations in Georgia escalated by 46.6% whereas other centrally assessed commercial and industrial property increased only 5.6%. Pet. 7, 20-21. Other States have shown similar aggressiveness in adopting breathtaking increases in valuation of rail property. *Id.* at 21-22. Respondents evade rather than answer these points. This Court's review is imperative.

1. The court below deepened an existing, mature split among the Circuits, expressly declaring that it was siding with the Fourth Circuit in conflict with the Second and Ninth Circuits. Pet. 9-10; Pet. App. 10a. Respondents concede that the court below adopted the rule of the Fourth Circuit. Opp. 8, 10. However, respondents argue that the Eleventh Circuit was wrong to declare its rule to be in conflict with the Second and Ninth Circuits. *Id.* at 13-16. That is patently incorrect.

Respondents make much ado about the fact that *Consolidated Rail Corp.* v. *Town of Hyde Park*, 47 F.3d 473 (2d Cir. 1995), "involved only the grant of a preliminary injunction," and that the test for the preliminary injunction "was met even when using the state's own value for the railroad property." Opp. 10; see also *id.* at 13-14. These points are simply irrelevant. While the Second Circuit did not resolve Conrail's *claim* on the merits because the issue at the preliminary injunction stage was simply "whether . . . the district court had reasonable cause to believe that a violation of the 4-R Act had occurred or was about to occur," 47 F.3d at 480, it did in the course of determining the propriety of the preliminary injunction decide the pure question of statutory interpretation of the 4-R Act. The Second Circuit expressly rejected the Fourth Circuit's decision of *Chesapeake Western Railway* v. *Forst*, 938 F.2d 528 (4th Cir. 1991), thereby creating an acknowledged circuit split: "The *Chesapeake* court viewed the method of appraisal as a matter of state policy that was beyond the reach of the 4-R Act. *We do not accept that interpretation of the statute*." 47 F.3d at 482 (emphasis added).

The precedential force of the Second Circuit's decision on a pure question of law is not affected either by the procedural posture of the case or by the Second Circuit's preliminary observation that on a "simplistic level . . . it *appears* that the district court had reasonable cause" to find a 4-R Act violation even under the State's valuation method. *Id.* at 480 (emphasis added). Courts routinely decide questions of law on preliminary injunction appeals; they do not merely address whether

the district court had "reasonable cause" to construe the law as it did.[1] The Second Circuit in *Consolidated Rail* announced a statutory construction that is binding in its jurisdiction, and that rule is in acknowledged conflict with the rule of both the Fourth and Eleventh Circuits.

Similarly unavailing is respondents' attempt to distinguish the Ninth Circuit's decision in *Burlington Northern Railroad* v. *Department of Revenue*, 23 F.3d 239 (9th Cir. 1994). Opp. 10. The Ninth Circuit did decline to decide whether to follow the Fourth Circuit's decision in *Chesapeake Western* (which involved a broader methodological question than was at issue in *Burlington Northern*). 23 F.3d at 240. However, respondents ignore the Ninth Circuit's actual holding: namely, that it was "proper" that "*the district court did not blindly accept the state's valuation method*," but instead "simply gave substantial deference to it," given that under applicable Washington law "the determination of the value of the property by public officials" "may be defeated only by evidence that is 'clear, cogent and convincing.'" *Id.* at 240-41 (quoting RCW 84.40.0301(1)) (emphasis added); see also *id.* at 241 (holding that the district court had "correctly applied" the Washington law standard); cf. 49 U.S.C. § 11501(c) ("[t]he burden of proof in determining assessed value and true market value is governed by State law").[2] Thus, respondents, not the court

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[1] *See, e.g.*, *This That & The Other Gift & Tobacco, Inc.* v. *Cobb County*, 439 F.3d 1275, 1284-85 (11th Cir. 2006) (holding "this Court's prior legal conclusion was binding on the district court, just as it is now binding on us" even though it was rendered at the preliminary injunction stage); *Nicholas v. Goord*, 430 F.3d 652, 659, 662-63, 664 (2d Cir. 2005) (applying rule of Court in *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), decided on appeal of a preliminary injunction denial), *cert. denied*, 127 S. Ct. 384 (2006); *New York Stock Exch., Inc.* v. *New York, N.Y. Hotel LLC*, 293 F.3d 550, 556-57 (2d Cir. 2002) (applying rule of Second Circuit regarding Lanham Act in *TCPIP Holding Co.* v. *Haar Commc'ns, Inc.*, 244 F.3d 88 (2d Cir. 2001), decided on appeal of a preliminary injunction grant).

[2] Respondents argue that the Ninth Circuit forecloses CSXT's position (which is based on precedent of this Court) that market value is a fact

below, "misapprehend[] the basis of the Ninth Circuit's decision." Opp. 15. Thus, regardless of whether *Burlington Northern* conflicts with *Chesapeake Western*, it indisputably conflicts with the rule below that the district court must accept "all nonfactual determinations involved in constructing a valuation process, regardless of how broad or narrow they may be," and accordingly should exclude any contrary evidence offered by the railroad on valuation methods. Pet. App. 17a. Not surprisingly, the Eleventh Circuit has declared a conflict with the Ninth Circuit as well as the Second. *Id.* at 10a. Respondents' effort to discredit the Eleventh Circuit's assessment fails.

2. Respondents' defense of the Eleventh Circuit rule on the merits also lacks force. Respondents mistakenly argue that the "clear statement" rule applies to this case because of federalism concerns and because CSXT does not dispute that the clear statement rule applies. Opp. 16-18. As an initial matter, respondents mischaracterize CSXT's position. CSXT argued that the meaning of the statutory term "true market value" is plain and satisfies any clear statement rule, but "[r]egardless, the Eleventh Circuit's invocation of the 'clear statement rule' is improper." See Pet. 16-17.

The clear statement rule applies to disputed interpretations of a federal statute that would "alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991). Thus, in *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332

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question to be decided on all appropriate evidence, Opp. 15-16, but they confuse separate issues. The Ninth Circuit held that the district court accords deference to the State's valuation where the railroad has the burden of proving market value by clear and convincing evidence. That is not inconsistent with CSXT's position that—regardless of burden of proof—the district court should make a factual determination of "true market value" based on all relevant evidence, including evidence of the proper methods for ascertaining "true market value." In any event, the burden of proof in Georgia is preponderance of the evidence. Pet. App. 37a.

(1994), this Court applied the clear statement rule in deciding whether a different subsection of the 4-R Act—Subsection 11501(b)(4)—deprived the States of the fundamental sovereign power to grant certain commercial and industrial entities tax exemptions that were not extended to railroads. This Court found no such clear statement in the ambiguous terms of subsection (b)(4), which "did not state whether exemptions are a form of forbidden discrimination against rail carriers, and further did not provide a standard for courts to distinguish valid from invalid exemption schemes." 510 U.S. at 343.

The clear statement rule does not apply every time a federal law touches upon an aspect of state sovereign power. Moreover, it is quite a stretch to claim that having a federal district court perform the commonplace judicial task of finding the fact of a property's true market value would somehow "alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory*, 501 U.S. at 460-61.[3]

Respondents misconceive the function and effect of Section 11501(b)(1). As the legislative history that respondents recite makes clear, a district court that finds a violation of subsection (b)(1) does not issue an injunction dictating what valua-

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[3] Indeed, it can hardly be claimed that subsection (b)(1)'s prohibition against direct discrimination against interstate railroads would alter the constitutional balance between federal and state governments. "It has long been accepted that the Commerce Clause . . . directly limits the power of the States to discriminate against interstate commerce," and "[t]hus, state statutes that clearly discriminate against interstate commerce are routinely struck down." *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 271, 273-74, 280 (1988); *Maryland* v. *Louisiana*, 451 U.S. 725, 754, 760 (1981) (recognizing the cardinal principle that the "State's right to tax interstate commerce is limited" and holding the tax "is unconstitutional under the Commerce Clause" and judgment "enjoining further collection of the [t]ax shall be entered"). Furthermore, respondents' federalism arguments are particularly ironic on the facts of this case, where the methodology was not adopted in a state statute or regulation, but only by a single appraiser who, respondents concede, changed the previous state appraiser's chosen methodology. Opp. 4.

tion and assessment methods a State may use in imposing taxes, and States may use whatever methods they like. See S. Rep. No. 90-1483, app. B at 22 (1968); *Common and Contract Carrier State Property Tax Discrimination: Hearing on H.R. 16245 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 132-33, 137-38 (1970) (statement of Philip M. Lanier). Section 11501 performs the very different function of a federal check on discrimination against interstate railroads. The railroads seek only to introduce evidence in order to prove the existence and degree of discrimination. Whatever methods the State employs, the end result is measured against the federal discrimination standard, 49 U.S.C. § 11501(b)(1), and the federal court may only intercede to grant injunctive relief when "the ratio of assessed value to true market value of rail transportation property *exceeds by at least 5 percent* the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction," *id.* § 11501(c) (emphasis added). The 4-R Act is thus quite deferential to States; it prohibits discrimination, but does not otherwise dictate how the State exercises its power to tax property within the State.

Thus, contrary to the claims of respondents, the question of statutory interpretation presented here has nothing to do with depriving States of "'a policy choice.'" Opp. 12 (quoting *Chesapeake Western*, 938 F.2d at 531). "True market value" is simply a factual determination necessary to adjudication of a federal discrimination claim. Respondents' objections that "'federal courts are ill equipped'" to make this determination, and that "[t]he concept of true market value is inherently an approximation," *id.* at 11-12, are unsound. This Court has recognized, even where there is no functioning market that prices the property, the trier of fact may still determine "fair market value" even though such a finding necessarily "involves the use of assumptions." *United States* v. *Miller*, 317 U.S. 369, 374-75 (1943). Congress's use of the phrase "*true*

market value" evinces an intent that federal district courts determine independently the objective market value, and not slavishly follow the State's valuation methodology. See *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("It is clear from this language that in order to compare the actual assessment ratios, it is necessary to determine what the 'true market values' are.").

Respondents make the self-serving claim that railroads should be satisfied with contesting factual determinations in the application of the State's methodology, as CSXT was limited to doing below. Opp. 20. But respondents' argument skips over the fact that choice of valuation methods is often the principal means by which state tax authorities accomplish discrimination. The district court candidly acknowledged that it would not consider *any* of the CSXT appraiser's analysis, because it did not use exactly the methodology employed by the State's appraiser. Pet. 8. CSXT can hardly be said to have had the opportunity to prove "true market value" without the opportunity to present its own valuation evidence by a competent appraiser.

In Section 11501(b)(1), "Congress prohibited discriminatory tax rates and assessment ratios *in no uncertain terms*, and set forth *precise standards for judicial scrutiny* of challenged rate and assessment practices." *ACF Indus.*, 510 U.S. at 337, 343 (emphasis added) (internal citation omitted). As the Solicitor General has previously represented to this Court, Pet. 12 n.3, Congress did not establish a federal anti-discrimination rule that state tax authorities could easily evade simply by embedding the discrimination in the choice of methodology. The Eleventh Circuit's rule eviscerates the 4-R Act and creates a stark conflict with the rule of other circuits. This case is a perfect vehicle for this Court to decide the straightforward statutory question presented.

3. There can be no question of the importance of this Court's immediate resolution of this case. CSXT showed in its Petition (at 19-22) that the Eleventh Circuit's rule openly

invites state tax officials to devise discriminatory methods for valuing railroad property. Railroads are handcuffed in proving discrimination even at a time when state appraisers in affected jurisdictions are becoming extraordinarily aggressive in their valuations of the property of railroads running through their States.

Respondents evade the evidence of this real world problem by arguing that the facts regarding "CSXT's 2006 property tax situation—whether in Georgia, Florida, or any other State—is [not] part of the record in this case," and these facts "therefore should just be ignored." Opp. 21. That is a red herring. This Court never relies simply on record evidence in assessing the practical importance of a question presented and the need for this Court's intervention, for the simple reason that those issues are not tried in the district court or relevant to the decision of the court of appeals. Significantly, respondents do not dispute any of CSXT's representations even as to their own 2006 practices (which are clearly within their knowledge). *Id.* at 21-22. Most tellingly, respondents do not even attempt to justify why valuations of railroad taxable property jumped 46.6% in 2006 while valuations of other centrally assessed commercial and industrial taxable property only increased 5.6%. *Id.*; see Pet. 20-21.

Respondents also ask this Court to disregard the increasing divergence in state valuations of CSXT's unit value: Georgia and Florida valued the CSXT system at $11.2 and $12.9 billion respectively in 2006, compared to an average in the other unit value States in the Fourth and Eleventh Circuits of $7.1 billion. Opp. 21-22; see Pet. 21-22. Their only justification is to cite the *Burlington Northern* decision approving a district court's exclusion of evidence of compromise values arrived at in negotiations with other States. Opp. 22. Respondents' argument is irrelevant. First, the $7.1 billion average is not based on any "compromise values" agreed to as a result of settlement of litigation or of a formal administrative appeal, and respondents do not suggest otherwise. Second, CSXT is

not seeking to introduce evidence of other States' valuations at trial. CSXT is simply pointing out that such broad and prejudicial divergence on what in theory should be a single number shows the danger of effectively immunizing the State's valuation methods from judicial review, and the need to give the 4-R Act its intended effect.

Respondents argue that state officials are entitled to a presumption that they have properly discharged their public duties. Opp. 21 (internal quotation marks and citations omitted). It is odd for respondents to invoke a presumption that applies only to shift the burden of proof on trial issues, and that of course can be rebutted by evidence.[4] CSXT is not asking for this Court to find wrongdoing; it is merely arguing for the opportunity to prove that the State discriminated—a burden that CSXT must assume under the statute. 49 U.S.C. § 11501(c).

Respondents are thus left attempting to defend their discriminatory tax practices by arguing that "the largest part of the 47% increase in CSXT's 2002 assessment over 2001 was due to" the State's change from using the R-1 reports to the companies' annual reports to shareholders. Opp. 5; see also *id.* at 23. That is yet another red herring. CSXT's appraiser also used the companies' annual reports to shareholders in arriving at a $6 billion unit value. Pl.'s Ex. 1, Tegarden & Associates, Inc., *Appraisal of the Operating Properties of CSX Transportation Inc.* 37-38 (Jan. 1, 2002); see Tr. Vol. 3, at 395-98. The issue in dispute between the parties is whether the 2002 unit value of CSXT was $6 billion (as CSXT maintains) or $8.2 billion (as respondents maintain); the selection of financial reporting data had nothing to do with that diver-

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[4] *See, e.g., United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("[I]n the absence of *clear evidence to the contrary*, courts presume that [government agents] have properly discharged their official duties.") (internal quotation marks omitted) (emphasis added); *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926) (same). Indeed, in the case cited by respondents, *Bracy* v. *Gramley*, 520 U.S. 899 (1997), this Court found "the presumption [was] soundly rebutted." *Id.* at 909.

gence since both appraisers used exactly the same database. CSXT's complaint is that the Eleventh Circuit denied it the opportunity to prove "true market value" of its rail transportation property. Moreover, even if *arguendo* use of financial reporting data had *some* effect on the valuation increase from 2001 to 2002, it cannot explain the increase to $11.2 billion just four years later. Pet. 20-21.[5]

Thus, this Court should grant certiorari not only to resolve the 2-2 split in the circuits, but because of "the importance of the question presented to the States and affected individuals." *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 596 (1999). Congress intended to remedy discrimination against interstate railroads by allowing proof of the "true market value" of railroad property under Section 11501(b)(1), and a comparison of the ratios of assessed to market value of railroad property vis-à-vis other commercial and industrial property. The question of whether a federal district court making the factual determination of "true market value" must accept the valuation method chosen by the State, no matter how discriminatory, is unquestionably of vital significance for both the States and the railroads. This Court's review is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Respondents also wrongly claim, Opp. 23, that CSXT management's view of the railroad's financial performance was reflected only in the financial reports, and not in the R-1s as well. *See* Tr. Vol. 6, at 886-92 ("I'm not comfortable saying management doesn't rely on information on how the business is doing in the R1. . . . So I'm not saying that the company doesn't rely on information in this report on how the company is operating.").

Respectfully submitted,

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